Supreme Court, U.S.
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No. 96-1769

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

OHIO ADULT PAROLE AUTHORITY, et al.
Petitioners,

v.

EUGENE WOODARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF OF PETITIONERS

In failing to dispute the significance of the questions presented and the existence of a conflict among the lower courts, respondent has effectively conceded the desirability of granting the petition for a writ of certiorari. This reply therefore will principally highlight the certworthiness of each issue presented, clarify certain matters incorrectly set forth, or relied upon, in respondent's brief in opposition and show that there is no obstacle to reviewing this important case.

1. Respondent offers little explanation why the Court should not grant the first question presented -- whether the due process limitations contained in *Evitts v. Lucey*, 469 U.S. 387 (1985), extend to executive clemency decisions.

a. Conspicuously missing from respondent's brief in opposition is any disagreement with our contention that the Sixth Circuit's decision creates a lower-court conflict of authority on this point. Though several lower courts have faced similar challenges to State clemency procedures, not one of them has held that clemency constituted a part of the State's overall procedure for prosecution and punishment, requiring additional due process review and ultimately the federalization of the clemency process. *See* Petition 15-16. On the contrary, each adhered to *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981), in rejecting a request to expand the due process limitations on a State's discretionary clemency procedure. *See* Petition 16.

b. Nor does respondent dispute the significance of this question. If anything, his brief illustrates the point. Anytime "a state acts in a field that is discretionary," he argues, "that act must be in accord with the Due Process Clause." Opp. Br. 2 (*citing Evitts*, 469 U.S. at 401). This theory not only makes *Dumschat* a dead letter, but also would potentially extend to other procedures, creating for example a right to counsel in post-conviction

proceedings. That the issue is national in scope, and extends well beyond the boundaries of the Sixth Circuit, is also demonstrated by the amicus brief submitted by California and twenty-eight other States asking the Court to review the issue. All told, then, thirty of the thirty-eight States with a death penalty agree that the decision below should be reviewed promptly. Their request, we respectfully submit, should be granted.

c. Respondent apparently tries to justify the denial of certiorari on the ground that the lower-court decision is correct. Opp. Br. 3-4. But the argument is not helpful and in the end inaccurate. Even if the Sixth Circuit's extension of *Evitts* to the clemency arena were correct, respondent could not -- and in fact does not -- deny that this represents an extension of *Evitts*. If accurate, all death-row inmates (indeed, all inmates generally since clemency extends to all incarceration) ought to be the beneficiaries of this new doctrine. Of course, in our view, this extension of *Evitts* is not accurate and thus respondent's merits argument cuts the other way on the certiorari question. In particular, it remains implausible that the wide discretion given the States in establishing and implementing a clemency procedure under the due process interpretation of *Dumschat* can tenably co-exist with a separate set of limitations on the same procedure under the due process interpretation of *Evitts*. One or the other case must govern the States' clemency laws, but not both.

d. Unable to dispute the significance of the question, the lower-court conflict of authority, or even the impact of the merits on the petition, respondent also argues that the case is not "ripe" for review. Opp. Br. 5. This, it should be emphasized, is respondent's only argument that the case does not represent a good vehicle for reviewing the issue. No other waiver, jurisdictional, or procedural

arguments are made on this question or even the second one presented. In truth, the procedural stance of the matter advances the desirability of using the case as a vehicle for reviewing this issue. The Sixth Circuit's holding involves a pure issue of law. It turns on whether *Dumschat* or *Evitts*, or both, govern State clemency procedures. Further factual development could not possibly aid the resolution of these competing interpretations of the case law. On the record presented, moreover, it is quite clear that the issue petitioners have raised is dispositive. The Sixth Circuit ruled that petitioners prevail as a matter of law under *Dumschat* but not under *Evitts*. A-11. The lower court record is similar. Both the magistrate and district court ruled for Ohio as a matter of law in the case. A-41, A-43. Nor is it the least bit unusual for the Court to review cases in which a final judgment has not yet been entered. *See Baker v. GMC*, No. 96-653, *cert. granted* (March 24, 1997); *Frisby v. Schultz*, 487 U.S. 474, 478 (1988);*Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 727 (1975). In this instance, finally, any further fact development concerning the particularities of Ohio's clemency procedure is bound simply to limit the relevance of this Court's decision to the other States. Better to review what is now a pure question of law with broad application -- are there one or two strands of due process limitations on a State's clemency procedure? -- than to narrow the issue (or worse, prohibit later review) through additional lower-court proceedings.

2. No less persuasive are respondent's suggestions as to why the second question -- did Ohio create an unconstitutional condition by permitting voluntary uncounseled interviews during the clemency process? -- should not be reviewed.

a. To begin with, it is important to emphasize what respondent does not say on this point. He does not

dispute the importance of the question. He does not dispute our contention that the Sixth Circuit decision conflicts with *Crampton v. Ohio*, 402 U.S. 183 (1971), and is in tension with *Brown v. United States*, 356 U.S. 148 (1958), and *Spencer v. Texas*, 385 U.S. 554 (1967). And he only cursorily responds to our contention that the decision below conflicts with *Baxter v. Palmigiano*, 425 U.S. 308 (1975). Nor does respondent offer any waiver or other procedural bars to reviewing the issue.

b. Respondent principally argues that the Sixth Circuit correctly extended the doctrine of unconstitutional conditions to the clemency setting. Opp. Br. 5-6. He is incorrect. Prior to the recent amendments to Ohio's clemency procedure, no inmate (whether death-row or not) was guaranteed an interview. Such interviews were, and long had been, discretionary. In expanding the availability of clemency interviews to all who sought them, Ohio was of course extending the number of ways in which inmates could seek mercy from the Governor. In doing so, however, Ohio did not want to create still another layer of legal review of a criminal sentence. In the State's view, the greater right to eliminate interviews altogether in reviewing clemency applications included the lesser right simply to offer voluntary uncounseled interviews.

Nor does an inmate face any unfair predicament that the interview will be used against him if the clemency process starts before his federal habeas petition has been completed. As an initial matter, that is so because clemency review does not even start unless the inmate chooses (as Mr. Woodard did here) to delay the filing of his stay motion. But, even in that situation, he is not prejudiced. He can always file a later clemency application (after direct review) and seek an interview at that point in time if he desires. Neither the facts nor the law, in short, warrant an extension

of the doctrine of unconstitutional conditions to the clemency setting.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, we respectfully submit that the writ should be granted.

Respectfully Submitted,

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